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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 In re: PARK WEST GALLERIES, INC.,  
9 MARKETING AND SALES PRACTICES  
10 LITIGATION

MDL No. 09-2076RSL

11 THIS DOCUMENT RELATES TO:

ORDER GRANTING IN PART  
MOTIONS FOR DISPOSITIVE  
RELIEF

12 Blackman v. Park West Galleries, Inc.,  
Case No. C08-1310RSL, and

13 Bouverat v. Park West Gallery, Inc.,  
14 Case No. C09-1177RSL.

15 This matter comes before the Court on “Defendants Holland America Line Inc.  
16 and Holland America Line-USA Inc.’s Motion to Dismiss Counts I, IV, V, VI and VII of  
17 Plaintiffs’ First Amended Class Action Complaint Pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6)”  
18 (C08-1310RSL, Dkt. # 53) and “Defendant Park West’s Motion for Summary Judgment” (C09-  
19 1177RSL, Dkt. # 56). The Holland America defendants argue that (1) plaintiffs’ Racketeer  
20 Influenced and Corrupt Organization Act claim is inadequately pled; (2) plaintiffs’ unjust  
21 enrichment claim is barred by a lack of contractual privity and the incidental beneficiary rule;  
22 (3) admiralty law preempts plaintiffs’ consumer protection claims and/or that those claims are  
23 inadequately pled; and (4) plaintiffs’ claim for declaratory and injunctive relief is duplicative  
24 and should be dismissed. Park West seeks summary dismissal of plaintiff Bouverat’s Florida  
25 consumer protection claim on the grounds that admiralty law preempts the cause of action or, in  
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ORDER GRANTING IN PART MOTIONS  
FOR DISPOSITIVE RELIEF

1 the alternative, that Florida’s law cannot reach transactions occurring on international waters.

2 Having reviewed the memoranda, declarations, and exhibits submitted by the  
3 parties and heard the argument of counsel, the Court finds as follows:

4 **A. RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT, 18 U.S.C. § 1962(c)**

5 A claim under § 1962(c) of the Racketeer Influenced and Corrupt Organization  
6 Act (“RICO”) requires allegations that defendants conducted an enterprise through a pattern of  
7 racketeering activity. See, e.g., Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir.  
8 2004). Standing to sue for damages under RICO is granted to “[a]ny person injured in his  
9 business or property by reason of a violation of section 1962 of this chapter . . . .” 18 U.S.C.  
10 § 1964(c). Holland America contends that plaintiffs’ injuries (*i.e.*, the loss of funds associated  
11 with the purchase of artwork at an inflated price) were not causally connected to the racketeering  
12 activity alleged.

13 Plaintiffs allege that defendants used mail and wire facilities to communicate  
14 among themselves regarding a scheme to defraud art purchasers, to advertise Park West’s  
15 auctions and artwork to individuals throughout the country, to mail phony artwork and  
16 certificates of authenticity to purchasers, and to transfer the proceeds of the sales to the  
17 participants. Defendants argue that, because plaintiffs have not alleged that they received  
18 advertising in the mail or were injured thereby, their losses were not caused by a violation of  
19 RICO. Holland America has not considered whether defendants’ alleged use of the mails and  
20 wires to organize defendants’ alleged enterprise, to distribute artwork, and/or to transfer the ill-  
21 gotten gains caused plaintiffs injury. The Court declines *sua sponte* to evaluate whether these  
22 activities constitute “racketeering activity” or whether factual and proximate causation exist.

23 Holland America also argues that plaintiffs have failed to allege “racketeering  
24 activity” with the specificity required by Fed. R. Civ. P. 9(b). The Court agrees. “Racketeering  
25 activity” includes any act indictable under the federal mail and wire fraud statutes, 18 U.S.C.  
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1 §§ 1341 and 1343. To allege a violation of these statutes, it is necessary to show (1) that  
2 defendants formed a scheme to defraud, (2) that they used the United States mails or wires in  
3 furtherance of the scheme, and (3) the defendants did so with specific intent to deceive or  
4 defraud. Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1399-1400  
5 (9th Cir. 1986). Rule 9(b) requires plaintiffs to detail with particularity the time, place, and  
6 manner of each act of mail or wire fraud and to identify the role of each defendant in the  
7 fraudulent scheme. Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397,  
8 405 (9th Cir. 1991). According to plaintiffs, Holland America violated the mail and wire fraud  
9 statutes when it communicated with the other defendants and its various offices about the  
10 scheme to defraud art purchasers, sent marketing materials to cruise passengers, and received the  
11 wrongful proceeds of the scheme. No specifics regarding these communications are provided:  
12 plaintiffs simply allege that “[d]efendants have committed wire fraud thousands or tens of  
13 thousands of times since at least 1993 . . . .” First Amended Class Action Complaint at ¶ 87.  
14 Plaintiffs’ claim of fraud is based on nothing more than unsupported accusations of an  
15 agreement and communications in furtherance thereof. Such conclusory allegations are  
16 insufficient, even under Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439-40 (9th Cir.  
17 1987) (complaint identifying alleged misstatements by content, date, and the document in which  
18 they appeared satisfied Rule 9). Plaintiffs’ RICO claim against Holland America, as currently  
19 alleged, must be dismissed. If plaintiffs choose to reassert this claim in an amended pleading,  
20 detailed allegations regarding the agreement between defendants and their use of the mails or  
21 wires in furtherance of that agreement are required.

## 22 **B. UNJUST ENRICHMENT**

23 Plaintiffs allege facts supporting all of the elements of an unjust enrichment claim  
24 under Washington law: (1) a benefit conferred, (2) knowledge of the benefit, and  
25 (3) circumstances that would make it unjust for Holland America to retain the benefit. Young v.  
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1 Young, 164 Wn.2d 477, 484 (2008). Defendants incorrectly argue that the lack of contractual  
2 privity between Holland America and plaintiffs bars this claim: to the contrary, the existence of  
3 an express contract would preclude an action on an implied contract relating to the same matter.  
4 Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 604 (1943). Nor may Holland America  
5 claim the status of incidental beneficiary from whom no restitution can be sought. In Farwest  
6 Steel Corp. v. Mainline Metal Works, Inc., 48 Wn. App. 719, 732 (1987), the court described the  
7 general rule as follows:

8       The mere fact that a third person benefits from a contract between two other  
9 persons does not make such third person liable in quasi contract, unjust  
10 enrichment, or restitution. Moreover, where a third person benefits from a contract  
11 entered into between two other persons, in the absence of some misleading act by  
12 the third person, the mere failure of performance by one of the contracting parties  
13 does not give rise to a right of restitution against the third person. In other words,  
14 a person who has conferred a benefit upon another, by the performance of a  
15 contract with a third person, is not entitled to restitution from the other merely  
16 because of the failure of performance by the third person.

17 (quoting 66 Am. Jur.2d Restitution and Implied Contracts, § 16 at 960). Plaintiffs allege that  
18 Holland America took part in a scheme to defraud its passengers and that it disseminated  
19 misleading information regarding Park West's business and artwork. In such circumstances,  
20 defendants are not merely innocent beneficiaries of a contract breached by Park West.  
21 Plaintiffs' claim of unjust enrichment may proceed.

### 22 **C. ADMIRALTY JURISDICTION AND STATE CONSUMER PROTECTION LAWS**

23       Although plaintiffs argue that it is premature for this Court to decide whether  
24 admiralty law applies, they do not explain why this issue cannot be resolved at this point in the  
25 litigation, especially when the pending dispositive motions turn in part on the nature of this  
26 Court's jurisdiction. Plaintiffs argue that the law of admiralty does not apply to their claims  
against Park West because the conduct of which Park West is accused occurred on both land and  
sea. Plaintiffs acknowledge, however, that Holland America was not involved in Park West's

1 land-based sales.

2       The Court finds that plaintiffs' claims against both Park West and Holland  
3 America satisfy the location and connection tests for admiralty jurisdiction as set forth in Jerome  
4 B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531-34 (1995). The location  
5 test is satisfied if the tort giving rise to the claim occurred on navigable waters. Plaintiffs allege  
6 that Park West made misrepresentations regarding the value and authenticity of works being sold  
7 at auction and that the named plaintiffs relied on these misrepresentations to their detriment.  
8 The auctions were held (and the misrepresentations were made) on cruise ships in international  
9 waters. While still at sea, the named plaintiffs contracted to pay sums certain for the artwork  
10 they purchased. Where plaintiffs took delivery of the artwork and whether defendants repeated  
11 their misrepresentations in the course of their interactions are immaterial: the tort giving rise to  
12 plaintiffs' claims occurred on navigable waters.

13       The connection test involves an assessment of the type of activity involved to  
14 determine whether it has a substantial relationship to traditional maritime activity. In addition,  
15 the Court must consider whether the tort at issue has "a potentially disruptive impact on  
16 maritime commerce." Grubart, 513 U.S. at 534 (quoting Sisson v. Ruby, 497 U.S. 358, 364 n.2  
17 (1990). Here, as in Beegal v. Park West Gallery, 925 A.2d 684, 696 (N.J. Super. Ct. App. Div.  
18 2007), both prongs of the connection test are met.

19       Auctions are commonplace, occur on many cruise ships, and are part and parcel of  
20 the cruise ship experience. The "character of the activity" – the services and  
21 diversions provided for cruise ship passengers while aboard ship – shows a  
22 "substantial relationship" to "traditional maritime activity." See [Doe v Celebrity  
23 Cruises, Inc., 394 F.3d 891, 900 (11th Cir. 2004)]. The conduct complained of  
24 here has a potentially disruptive impact on maritime commerce – if cruise ship  
25 passengers know they are subject to fraudulent conduct while aboard ship, the  
26 cruise ship industry will "necessarily suffer." See ibid. It is thus irrelevant that  
defendants may have planned the fraudulent scheme or trained the auctioneers on  
land. See Norfolk S. Ry. Co. [v. James N. Kirby Pty. Ltd.], 543 U.S. 14, 25 (2004)]  
(shore an artificial place to draw the line). Given the primary purpose of admiralty

jurisdiction, protecting maritime commerce, Foremost [Ins. Co. v. Richardson], 457 U.S. 668, 674-75 (1982)], admiralty jurisdiction is proper here.

When admiralty law applies, it preempts state consumer protection laws if there is a conflict. Wilburn Boat Co. v. Fireman's Ins. Co., 348 U.S. 310, 314 (1955). Because the damage provisions of the Washington Consumer Protection Act ("WCPA"), the Connecticut Unfair Trade Practices Act ("CUTPA"), and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") allow for the recovery of attorney's fees and/or treble damages, they conflict with established admiralty law and are preempted. See F.W.F., Inc. v. Detroit Diesel Corp., 494 F. Supp.2d 1342, 1352-53 (S.D. Fla. 2007), aff'd, 308 Fed. Appx. 389 (11th Cir. 2009); DeRossi v. Nat'l Loss Mgmt., 328 F. Supp.2d 283, 288-89 (D. Conn. 2004). Count V of the First Amended Class Action Complaint in Blackman v. Park West Galleries, C08-1310RSL, which alleges a WCPA claim against Holland America, and the FDUTPA claim asserted in Bouverat v. Park West Gallery, C09-1177RSL, therefore fail as a matter of law.

Defendants have not, however, shown that admiralty law preempts all of the consumer protection laws at issue in this litigation. Plaintiffs have asserted claims under the consumer protection laws of 32 jurisdictions, including Washington. In their dispositive motions, defendants address only the laws of Connecticut, Florida, and Washington. Although the consumer protection laws of those jurisdictions are preempted for the reasons discussed above, defendants have not shown that the laws of the other 29 jurisdictions are preempted.

In Bouverat, Park West argues that, even if admiralty law does not govern, any attempt to apply Florida's Deceptive and Unfair Trade Practices Act to conduct occurring in international waters would violate the Commerce Clause of the United States Constitution. The Constitution gives to Congress the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. Art. I, § 8. Congress' exclusive authority over interstate and international commerce necessarily excludes the states from those spheres of activity. See New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273

1 (1988). The Commerce Clause “precludes the application of a state statute to commerce that  
2 takes place wholly outside of the [s]tate’s borders, whether or not the commerce has effects  
3 within the [s]tate.” Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982). Not every statute that  
4 impacts interstate or international commerce is invalid, however. Edgar, 457 U.S. at 640 (1982).  
5 A statute that advances legitimate state interests, such as the protection of consumers, may  
6 survive a Commerce Clause challenge if the state’s interests outweighs the burden on interstate  
7 or international commerce. Pike v. Bruce Church, 397 U.S. 137, 142 (1970); Midwest Title  
8 Loans, Inc. v. Ripley, 616 F. Supp.2d 897, 903 (S.D. Ind. 2009).

9 Plaintiffs argue that FDUTPA does not run afoul of the Commerce Clause because  
10 (a) the legislature was not attempting to directly regulate international commerce, (b) the act is  
11 designed to address primarily local concerns, and (c) any effect FDUTPA has on international  
12 commerce is incidental and not excessive in relation to the putative local benefits. See ITCO  
13 Corp. v. Michelin Tire Corp., 722 F.2d 42, 48 n.9 (4th Cir. 1983); Syndicated Publ’ns, Inc. v.  
14 Montgomery County, 921 F. Supp. 1442, 1448-49 (D. Md. 1996). In the circumstances  
15 presented here, FDUTPA does not satisfy the third element. “The critical inquiry [when  
16 determining if the effect on international commerce is direct or incidental] is whether the  
17 practical effect of the regulation is to control conduct beyond the boundaries of the [s]tate.”  
18 Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989). Despite plaintiffs’ effort to highlight every  
19 contact Park West has with Florida, the commerce at issue in this case (*i.e.*, the sale and  
20 purchase of artwork) occurred on international waters. Bouverat’s consumer protection act  
21 claim is based on the assumption that the protections of FDUTPA travel with him wherever he  
22 goes, such that a shop owner in Milan, a tour guide in Costa Rica, and an auctioneer in the Baltic  
23 Sea are all required to comply with the statute if their customer is a Florida resident. “[T]he  
24 practical effect of the statute must be evaluated not only by considering the consequence of the  
25 statute itself, but also by considering how the challenged statute may interact with the legitimate  
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1 regulatory regimes of other [s]tates and what effect would arise if not one, but many or every,  
2 [s]tate adopted similar legislation.” Healy, 491 U.S. at 336. Because the projection of FDUTPA  
3 into international waters would result in the regulation of commerce wholly outside Florida’s  
4 boundaries and would impose inconsistent regulatory schemes on trading partners, the statute’s  
5 effect on international commerce is not merely incidental. Not even Florida’s substantial and  
6 legitimate interest in protecting its citizens from unfair trade practices can justify the direct and  
7 substantial effect FDUTPA would have on international commerce if it were applied to foreign  
8 transactions whenever a Florida citizen were involved.

9 Thus, the Commerce Clause precludes application of FDUTPA to consumer art  
10 sales occurring on international waters. The reasons for this bar apply equally to all of the other  
11 state consumer protection laws asserted by plaintiffs in this case. Accordingly, the Court finds  
12 that plaintiffs’ consumer protection act claims arising from the sale and purchase of artwork in  
13 international waters are barred by the Commerce Clause and must be dismissed.<sup>1</sup>

14 **D. DECLARATORY JUDGMENT ACT, 28 U.S.C. § 2201, *ET SEQ.***

15 Holland America argues that plaintiffs’ request for declaratory relief is improper  
16 because litigation has been joined and the resolution of plaintiffs’ other claims will obviate the  
17 need for declaratory relief. In addition to declaratory relief, plaintiffs have also requested  
18 injunctive relief. Whether plaintiffs’ requests for relief under the Declaratory Judgment Act are  
19 duplicative can best be determined later in the litigation. Defendants’ motion to dismiss Count  
20 VII of the Blackman complaint is therefore denied without prejudice to the issue being raised  
21 again.

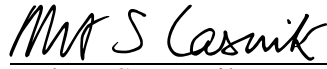
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24 <sup>1</sup> Because plaintiffs’ consumer protection act claims are either preempted by admiralty law or  
25 barred by the Commerce Clause, the Court need not determine whether plaintiffs adequately alleged the  
26 existence of trade or commerce and/ or an unfair trade practice under the various state laws.



1 For all of the foregoing reasons, the Court GRANTS in part defendants'  
2 dispositive motions. Plaintiffs' RICO and state consumer protection claims are hereby dismissed  
3 in their entirety. Plaintiffs' unjust enrichment claim and requests for declaratory/injunctive relief  
4 may proceed.

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6 Dated this 5th day of January, 2010.

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8 Robert S. Lasnik  
9 United States District Judge  
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